

**Disclaimer:** This document is a guide and is not intended as a substitute for the specific statutory language. Please seek and review the actual language of the legislation discussed in this guidance and contact the General Counsel's Office for questions.

**Introduction:** With the passage of H. 503 (Act 62), the following changes should be made to DUI processing related to evidentiary blood samples effective immediately. Each barracks should confer directly with their local prosecutors to confirm their respective positions on Act 62 and obtaining actual, voluntary consent and/or obtaining a search warrant.

In response to the United States Supreme Court decision, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the Legislature passed Act 62. This Act clarifies that law enforcement can no longer obtain a blood sample from a person suspected of operating under the influence through implied consent, by which an operator was previously deemed to have given consent under certain circumstances set forth in 23 V.S.A. § 1202(a)(2).

Under the new law, law enforcement officers must obtain actual, voluntary consent or a search warrant before obtaining an evidentiary blood sample. The specific situations addressed in the law are outlined below. There is no change in the process for obtaining evidentiary breath samples and pursuant 23 V.S.A. § 1201(b) a person may be charged criminally for a refusal to submit to an evidentiary *breath* test if the person has been previously convicted under section 1201 and the officer has reasonable grounds to believe the person is operating under the influence. Section 1201(b) should no longer be read to allow a person to be charged with criminal refusal for refusing to submit to an evidentiary blood test.

#### **PROCESSES FOR OBTAINING AN EVIDENTIARY BLOOD SAMPLE:**

##### **A. Fatality or serious bodily injury:**

Continue with the current practice as follows:

1. Determine that an evidentiary test is required based on reasonable grounds to believe that the person was operating, attempting to operate, or in actual physical control of a motor vehicle in violation of 23 V.S.A. § 1201 ("Operating vehicle under the influence of intoxicating liquor or other substance; criminal refusal; enhanced penalty for BAC of 0.16 or more");
2. The person is a surviving operator of a motor vehicle involved in a fatal incident or collision or an incident or collision resulting in serious bodily injury;
3. There are reasonable grounds to believe that the person has any amount of alcohol or other drug in his or her system;
4. Explain the processing, including your request for an evidentiary test and, if they refuse to submit to an evidentiary test(s), state your intention to seek a search warrant for their blood<sup>1</sup>;

5. Allow the person an opportunity to speak with an attorney<sup>ii</sup>;
6. Following attorney consultation, request the operator submit to an evidentiary test; and
7. If the operator provides actual, voluntary consent to submit to the evidentiary test memorialize their consent via a consent card, or written consent included in the processing form or by video/audio tape.

If the person refuses to provide an evidentiary blood sample, you must obtain a search warrant from a judicial officer if you can establish probable cause for the search warrant.

**B. Breath testing equipment is not reasonably available:**

Implied consent no longer applies, therefore, in this circumstance, please make the following determinations and take the steps listed below as necessary:

1. An evidentiary test is required based on reasonable grounds to believe that the person was operating, attempting to operate, or in actual physical control of a motor vehicle in violation of 23 V.S.A. § 1201;
2. Breath testing equipment is not reasonably available;
3. Explain the processing, including your request for an evidentiary blood test and, if they refuse to submit to an evidentiary blood test, state your intention to seek a search warrant for their blood;
4. Allow the person an opportunity to speak with an attorney;
5. Following attorney consultation, request the operator submit to an evidentiary blood test; and
6. If the operator provides actual, voluntary consent to submit to the evidentiary blood test memorialize their consent via a consent card, or written consent included in the processing form or by video/audio tape.
7. The operator is refusing to provide actual, voluntary consent to submit to an evidentiary blood test.

If the operator refuses to provide actual, voluntary consent to submit to an evidentiary blood test you must obtain a search warrant from a judicial officer if you can establish probable cause for the warrant.

**C. The officer has reason to believe that the person is unable to give a sufficient sample of breath for testing.**

Implied consent no longer applies, therefore, in this circumstance, please make the following determinations and take the steps listed below as necessary:

1. An evidentiary test is required based on reasonable grounds to believe that the person was operating, attempting to operate, or in actual physical control of a motor vehicle in violation of 23 V.S.A. § 1201;
2. You have reason to believe that the person is unable to submit a sufficient sample of breath for testing

3. Explain the processing, including your request for an evidentiary blood test and, if they refuse to submit to an evidentiary test, state your intention to seek a search warrant for their blood.
4. Allow the person a second opportunity to speak with an attorney;
5. Following attorney consultation, request the operator submit to an evidentiary blood test; and
6. If the operator provides actual, voluntary consent to submit to the evidentiary test memorialize their consent via a consent card, or written consent included in the processing form or by video/audio tape.

If the operator refuses to provide actual, voluntary consent to submit to the evidentiary blood test you must obtain a search warrant from a judicial officer if you can establish probable cause for the warrant.

**D. The officer has reasonable grounds to believe that the person is under the influence of a drug other than alcohol.**

Implied consent no longer applies, therefore, in this circumstance, please make the following determinations and take the steps listed below as necessary:

1. An evidentiary test is required based on reasonable grounds to believe that the person was operating, attempting to operate, or in actual physical control of a motor vehicle in violation of 23 V.S.A. § 1201;
2. Explain the processing, including your request for an evidentiary blood test and, if they refuse to submit to an evidentiary blood test, state your intention to seek a search warrant for their blood;
3. Allow the person an opportunity to speak with an attorney;
4. Following attorney consultation, request the operator submit to an evidentiary blood test; and
5. If the operator provides actual, voluntary consent to submit to the evidentiary test memorialize their consent via a consent card, or written consent included in the processing form or by video/audio tape.

If the operator refuses to provide actual, voluntary consent to submit to an evidentiary blood test you must obtain a search warrant from a judicial officer if you can establish probable cause for the warrant.

**E. In the officer's opinion the person is incapable of decision or unconscious or dead.**

*(Please note in cases involving the death of a subject, the sample will be collected by the Office of the Chief Medical Examiner.)* Implied consent no longer applies, therefore, in this circumstance, please make the following determinations and take the steps listed below as necessary:

1. An evidentiary test is required based on reasonable grounds to believe that the person was operating, attempting to operate, or in actual physical control of a motor vehicle in violation of 23 V.S.A. § 1201;
2. The officer has reasonable grounds to believe that the person is incapable of decision, unconscious or dead;
3. If the officer has reasonable grounds to believe the person is incapable of decision continue to 4. If the officer has reasonable grounds to believe the person is unconscious or dead skip

- 4 through 8 and obtain a search warrant from a judicial officer if you can establish probable cause for the warrant;
4. Explain the processing, including your request for an evidentiary blood test and, if they refuse to submit to an evidentiary blood test, state your intention to seek a search warrant for their blood;
  5. Allow the person an opportunity to speak with an attorney;
  6. Following attorney consultation, only if the officer determines the operator is capable of making a decision request the operator submit to an evidentiary blood test;
  7. If the operator provides actual, voluntary consent to submit to the evidentiary blood test memorialize their consent via a consent card, or written consent included in the processing form or by video/audio tape.
  8. If the officer continues to have a reasonable belief that the operator is incapable of providing actual, voluntary consent obtain a search warrant from a judicial officer if you can establish probable cause for the warrant.

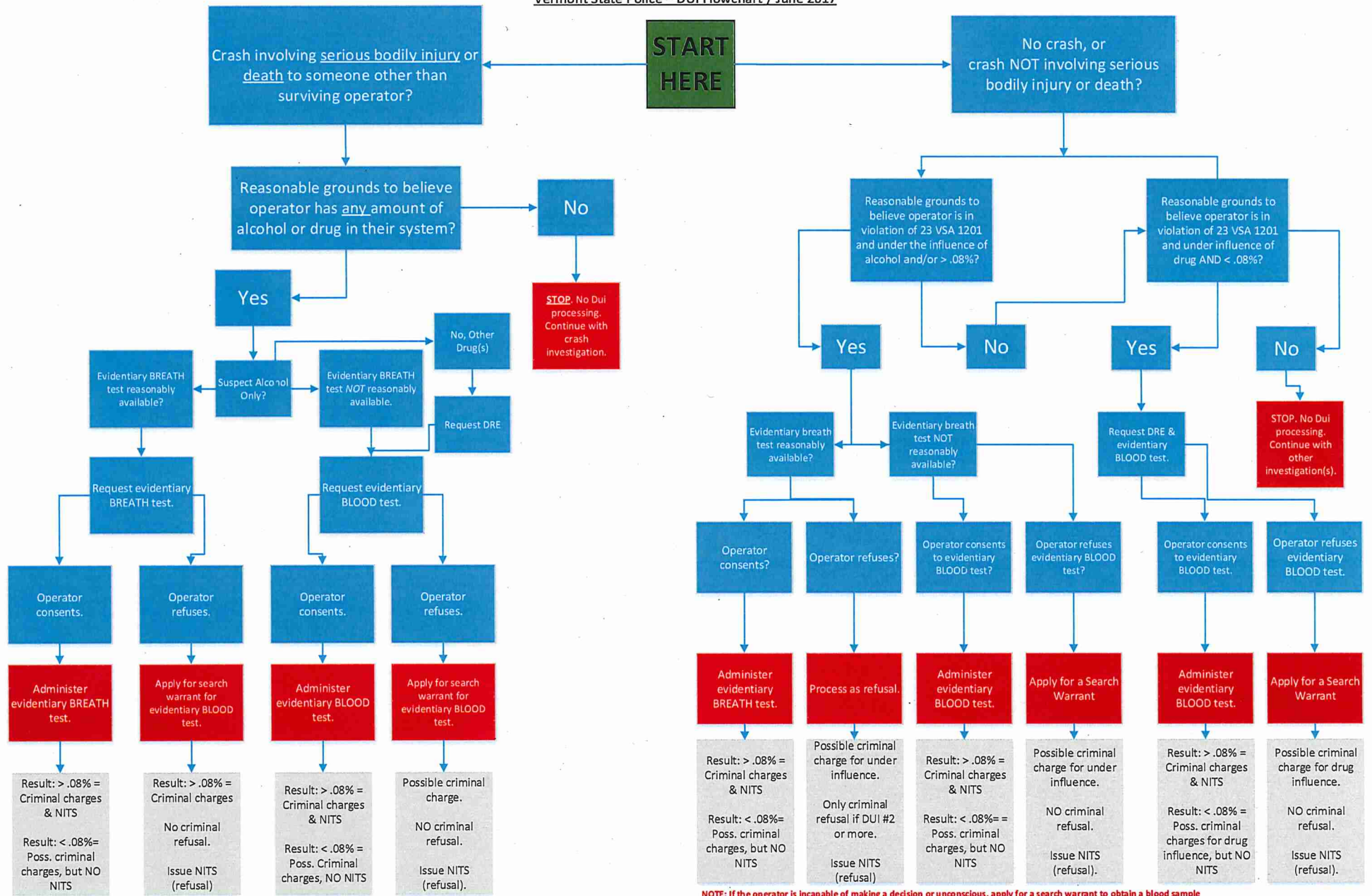
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<sup>i</sup> Consult with your local State's Attorney to determine if they want you to obtain a search warrant in all suspected DUI cases involving a collision resulting in a fatality or serious bodily injury.

<sup>ii</sup> Please note 23 V.S.A. § 1202(c) provides, "A person who is requested by a law enforcement officer to submit to an evidentiary test or tests has the limited right to consult an attorney before deciding whether or not to submit to such a test or tests." Therefore, in instances where, in the event of a person's refusal, you can seek an evidentiary blood sample via actual voluntary consent or via a search warrant, you should inform the person of all their various rights prior to the attorney consultation. Otherwise, due to the identified limitations you will have to allow for a second attorney consultation thereby adding an additional 30 minutes to the processing period. The limitations are: the decision must be made within a reasonable amount of time and no later than 30 minutes from the time of the initial attempt to contact the attorney, and a decision must be made within 30 minutes regardless of whether a consultation took place.



Vermont State Police – DUI Flowchart / June 2017



NOTE: If the operator is incapable of making a decision or unconscious, apply for a search warrant to obtain a blood sample

